U.S. Department of Labor

Office of Administrative Law Judges
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DATE: March 2, 2000

CASE NO: 1999-INA-126

In the Matter of

MR. AND MRS. DANIEL & SUSAN ASHLEY
Employer

on behalf of

MARY O. BINGCOLA
Alien

Appearances: Ricardo B. Marasigan, Esq.
For Employer and Alien

Certifying Officer: Raimundo A. Lopez, Region I

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Mr. & Mrs. Daniel and Susan Ashley's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the

alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On March 17, 1997, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Connecticut Department of Labor on behalf of the Alien, Mary O. Bingcola. (AF 85). The job opportunity was listed as "Cook (family) Live-In or Live Out." (Id.). The job duties were described as follows:

> Prepare, cook [and] serve meals for family & during social functions at home; purchase & inventory cooking ingredients; plan menus for social functions and private parties at home; clean kitchen area after meals; knowledge of oriental cooking. Also cook/serve food during business functions at home.

(Id.). The stated job requirements for the position, as set forth on the application, are two years experience in the job offered or two years of "household cooking exp.; or rest. cook." Other special requirements included: "Good references; neat & non-smoking at workplace; available for weekend and holiday duties." (Id.).

The CO issued a Notice of Findings ("NOF") on September 18, 1998, proposing to deny certification. (AF 35-38). First, the CO found that the duties described by employer did not appear to constitute full-time employment in the context of employer's household, citing 20 C.F.R. 656.3. (AF 36). Second, the CO found that in accordance with Section 656.21(b)(2)(i), the requirement that the worker live on the Employer's premises is unduly restrictive unless supported by evidence of business necessity. (AF 37). Third, the CO found that the Employer rejected U.S. applicants for other than job-related reasons. The CO instructed the Employer to submit convincing documentation to justify the rejection of the three U.S. applicants. (Id.).

The Employer submitted its rebuttal to the NOF on October 12, 1998. (AF 20-34). The Employer provided answers to the questions raised by the CO in an effort to document that the job duties would constitute full-time employment in the context of the Employer's household. Employer explained that the alien began to work for Employer ten years ago when the family was

living in Hong Kong. Employer stated that: "We are extremely grateful for Ms. Bingcola's loyal and consistently excellent job performance during the past ten years. She is uncommonly responsible, efficient and a highly skilled and tireless worker. After ten years, she has virtually become a member of our family." (AF 22). In addition, Employer provided a typical daily schedule for the cook and provided a schedule of family and business dinners and luncheons. (AF 23). Employer asserted that there "has **never** been a requirement for a live-in cook" which the CO had suggested in the NOF. (AF 26) (emphasis in original). Employer argued that the application clearly indicates either live-in or live out services are acceptable. (Id.). Finally, Employer provided explanations for rejecting each of the three applicants. (Id). Employer rejected applicant Joseph because she has held eight positions in seven years which indicated "a lack of commitment to previous employers and a tendency to instability." (AF 27). Applicant Armstrong was rejected because of her "pronounced difficulty in speaking English," and applicant Smith was rejected after three phone messages were left for him to which he did not respond. (Id.).

The CO issued a Final Determination on November 5, 1998, denying certification. (AF 15-18). The CO found that the Employer's rebuttal failed to establish that the cook duties described would constitute full-time employment in the context of the Employer's household. (AF 17). In addition, the CO found that the Employer's statements regarding the live-in requirement suggested that the position arises from Employer convenience rather than business necessity. (AF 18). Finally, the CO found that the rejection of two qualified U.S. applicants was not justified. (Id.). The CO accepted the Employer's rejection of applicant Armstrong based on the applicant's inability to communicate on a basic level. (Id.).

The Employer filed a Petition for Review on November 30, 1998 (AF 1A-10). The CO denied the Petition for review on January 20, 1999. (AF 1). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review.

Discussion

Pursuant to 656.21(b)(6), an employer is required to document that if U.S. workers applied for the job opportunity, they were rejected solely for lawful, job-related reasons. Furthermore, the job must have been open to any qualified U.S. worker. 20 C.F.R. 656.20(c)(8). There is an implicit requirement that employers engage in a good faith effort to recruit qualified U.S. workers. *Daniel Costiuc*, 94-INA-541 (Feb. 23, 1996); *H.C. Lamarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, an employer has not proven that there are not sufficient U.S. workers who are able, willing, qualified and available to perform the work as required under Section 656.1.

In the instant case, the CO questioned the Employer's rejection of three U.S. applicants. The CO found that applicant Smith easily met the Employer's requirements for the position. The Employer's results of recruitment report indicated that the reason for rejection was that the applicant never responded to three attempts at leaving messages on his answering machine. The CO specifically instructed the Employer to provide the CO with "any documentation indicating what

other means of contact were utilized by the employer to contact U.S. applicant, i.e. certified mail and/or domestic return receipts or telephone records." (AF 38). In his rebuttal, Employer restated the original reason for rejecting applicant Smith, and stated that "I did not anticipate that need of establishing the veracity of having made such calls. If so, we might have recorded our attempts on a cassette recorder." (AF 27). Employer stated that he could not furnish telephone receipts as the calls were local calls placed from their home.

A good faith effort at recruitment requires proof of reasonable efforts to contact the applicants. *Garment Associates*, 91-INA-143 (July 14, 1992). Mere telephone calls which fail to show any message reaching the applicant are not sufficient to meet this burden. *G.C.M. Iron Works, Inc.*, 91-INA-81 (Mar. 27, 1992); *Dove Homes, Inc.*, 87-INA-680 (May 25, 1988). Where attempts to reach an applicant by telephone are not successful, a reasonable effort requires alternative action, including mail. *See e.g., Sasan, Inc. (D/B/S/ Mr. Jiffy)*, supra; *Northeastern Lumbar and Millwork*, 94-INA-105 (Feb. 13, 1995); *Jerry's Bagel*, 93-INA-461 (June 13, 1994); *Diana Mock*, 88-INA-255 (Apr. 9, 1990); *Bay Area Women's Resource Center*, 88-INA-379 (May 26, 1989) (*en banc*); *Shaw's Crab House*, 89-INA-139 (Jan. 3, 1990).

In his Petition for Review, the Employer submitted a telephone bill to evidence that a one-minute telephone call was placed to Mr. Smith by the Employer on one occasion. (AF 10). Employer argued that this telephone record came into the Employer's possession recently, and asserted that two other calls were made as well, although not documented on the telephone bill. (AF 7). The Employer requested that this record be considered by the Board, citing *Beth Jacob Hebrew Teacher's College*, 97-INA-168 (July 27, 1998).

In *Beth Jacob Hebrew Teacher's College*, the CO chose to credit the U.S. applicants questionnaires over the employer's contemporaneous summaries of each of the alleged applicant contact and interviews. There, the Employer had submitted new evidence with its Request for Review consisting of telephone bills, which were not available to the Employer at the time of filing its rebuttal. The Board found that in light of the fact that the CO did not address, but simply discredited, Employer's rebuttal, the CO should have considered the newly submitted evidence and addressed its ramifications. *Beth Jacob Hebrew Teacher's College*, *supra*. This is not the issue in the instant case. Here, the CO addressed the Employer's rebuttal and found that the Employer failed to present a sufficient basis for rejecting the applicant. The CO stated in the FD that: "The employer has an obligation to try alternative means of contact. Telephone calls that fail to show that any message actually reached the applicant are not sufficient to meet this burden." (AF 18). Therefore, the CO was correct in choosing not to consider the newly submitted evidence with Employer's Petition for Review.

The Employer has not documented a reasonable effort to contact applicant Smith.[1] Addresses were available for all the applicants (AF 54-60) and a certified letter would have been

[1]Employer's rebuttal statement that: "After 10 years, [the alien] has virtually become a member of our family" further corroborates the CO's conclusion that Employer made no bona fide attempts to contact this applicant. (AF 22).

a minimally acceptable effort on the part of the Employer when it could not reach applicant Smith by telephone. *See Ceylion Shipping, Inc.*, 92-INA-322 (Aug. 30, 1993).

Since the Employer has failed to show that it made adequate attempts to contact the U.S. applicant Smith, or that their rejection of this applicant was for lawful, job related reasons, certification was properly denied. It is, therefore, unnecessary to discuss the CO's finding of no full time employment under *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*) and *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*). Remanding the case for issuance of a supplemental NOF pursuant to *Uy*, *Schimoler*, and *Bunzel* in order for the CO to analyze whether there is a *bona fide* opportunity under the totality of the circumstances test, pursuant to 20 C.F.R. § 656.20(c)(8) is not appropriate under the facts at bench.

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California